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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. .....

October Term, 1971

STANFORD T. BAKER, JR.,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

No. .....

October Term, 1971

STANFORD T. BAKER, JR.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled case on March 24, 1972.

Opinions Below

1. The memorandum opinions of the Erie County Court (Hon. Joseph S. Mattina, County Judge presiding) of June 8, 1970, and July 1, 1970, are unreported. (See Appendices C and D). The opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department,

issued June 25, 1971, is reported at 37 A. D. 2d 139, 322 N. Y. S. 2d 374. (See Appendix B). The opinion of the New York Court of Appeals, issued March 24, 1972, is reported at 30 N. Y. 2d 252, ____ N. E. 2d ____, ____ N. Y. S. 2d ____ (See Appendix A).

Jurisdiction

2. The Judgment of the New York Court of Appeals was issued March 24, 1972, and entered in the office of the Clerk of Erie County on March 30, 1972. An order denying petitioner's motion to amend the remittitur was issued by the Court of Appeals on April 27, 1972. (See Appendix H). No order has been entered respecting the granting of an extension of time within which to petition for certiorari. This Court has jurisdiction of this petition pursuant to the provisions of Title 28, United States Code, Section 1257 (3).

Questions Presented

3. The following questions are presented for review:

a. Is the issuance of a search warrant which directs the immediate search of a specified place and person (and others who may be present) and which is based on information indicating that the contraband sought to be seized will arrive at that place one week after the issuance, violative of the Fourth Amendment of the United States Constitution?

b. Does the issuance of a search warrant, which is based soley on information indicating that contraband *will arrive* at a specified place *one week after* the issuance, fail to meet the Fourth Amendment requirement that probable cause exist at the time of the issuance of such warrant?

c. If a search warrant may validly issue based on facts which, when completed by the anticipated future delivery of contraband to the search premises, would support the finding of probable cause, is the warrant constitutionally deficient when it does not limit the time of execution to a time after which the delivery has occurred?

d. Where the terms of a search warrant indicate that contraband is currently at the premises and require immediate execution, does a one week delay in execution render it invalid under the Fourth Amendment if the sole reason for the delay is to ensure the presence of the contraband on the premises at the time of execution?

Constitutional and Statutory Provisions

4. The following constitutional and statutory provisions are involved in this case, the complete citation and applicable text thereof being included at Appendix E:

(a) United States Constitution, Fourth Amendment and Fourteenth Amendment, Section 1, Second Sentence.

(b) New York Code of Criminal Procedure §§ 796, 797, 802 (Repealed September 1971).

Statement

5. The sole issue involved herein is the validity of a search warrant challenged on a timely pre-trial suppression motion and upheld by the courts below. No information was presented to the judge who issued the warrant other than that contained in the affidavit applying for it. (R 105-106; affidavit at R 56).[1] The affidavit (set forth at Appendix F hereto) was made on January 9, 1970, and presented the following facts to the warrant judge:

[1] "R 56" and similar designations refer to pages of original Joint Appendix in Record to Appellate Division, commencing at page "C. A. 14" of the supplemented record to the Court of Appeals.

(a) A package with a printed return address indicating the sender as Sgt. Stan Baker with San Francisco Army Post Office address and addressed to one Bobby Fahy, 71 Arnold Street, Buffalo, New York, was then located at the Buffalo, New York, post office.

(b) The package contained (1) a bluish grey suede coat and (2) two packages containing marijuana (as determined by laboratory test).

(c) The package had been resealed after testing and made ready for delivery. It continued to be at the Post Office awaiting scheduled delivery on January 16, 1970, one week later.

(d) One "Barbara Fay AKA as Fahy is known as 'Bobby' and . . . has on several occasions in the past accepted mail for one Stan Baker, at 71 Arnold St. Buffalo, N. Y."[2]

(e) Barbara Fay resided in an upper apartment at the 71 Arnold Street address, that being the apartment sought to be searched.

6. The judge was not told that in fact the defendant was then on leave from the Army, that he had married Barbara Fay early that same month and that he was temporarily at the subject apartment. No information indicated prior involvement of Barbara Fay with drugs or drug users or that she knew the package was coming to her or that it would contain any contraband. The intermediate appellate court has acknowledged that the return address on the package did not in any way establish that the defendant had in fact mailed the package or knew of its contents (37 A. D. 2d at 141, 322 N. Y. S. 2d at 375-76).

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[2] At the suppression hearing, the officer who submitted the affidavit testified he had no knowledge what kind of mail was referred to (R 124).

7. The search warrant was issued January 9, 1970 (Appendix G). Adhering to the statutory form (Code of Criminal Procedure § 797), it included a judicial finding that "certain property is unlawfully possessed by Barbera [*sic*] Fay AKA Bobby Fahy" and directed "an immediate search" of the apartment to seize the package then in Post Office custody, together with "a dangerous drug, to include, marihuana" and other property which would aid in identifying the owner of the drug. The description did not limit the drug to be seized to that in the package (R 51-52). On January 16, 1970, the package was delivered while the residence was under police surveillance. Seventeen minutes after delivery, the police executed the search warrant and arrested defendant (together with his wife, the addressee of the package) (R 28, 135). On the subsequent trial, defendant was convicted of Criminal Possession of a Dangerous Drug in the Sixth Degree (N. Y. Penal Law § 220.05), from which conviction an appeal was taken, leading ultimately to this petition.

Presentation of Federal Questions

8. Before trial, defendant presented his written motion (R 24) to suppress the seized evidence in a timely manner. The motion papers urged that the warrant was invalid under the Fourth and Fourteenth Amendments, among other reasons, because "not based upon a proper and legal finding of probable cause", since the affidavit applying for it failed to show the current presence of any dangerous drug at the search premises (R 34, 41). The factual allegations supporting the motion were set forth in the moving affidavits (R 28-33, 48).

9. A brief hearing on the suppression motion was held before the Erie County Court (R 91 *et seq.*). The court then issued its decision and opinion dated June 8, 1970 (Appendix C), which dealt solely with issues other than the prematurity of the application for and issuance of the warrant. Petitioner moved for reargument by motion papers dated June 16, 1970 (R 65 *et seq.*) on the ground that the sole remaining claim as to invalidity of the warrant was that "it was issued prior to the time when the package received at the Post Office in Buffalo, New York had been delivered to defendants" (R 68). Reargument was granted and the court issued its further opinion (Appendix D) denying defendants' motion, noting that defendants' claim was that the warrant could not be issued while the drug "was on its way" but could only issue after it had arrived (R 71-72). A further application for hearing was made and denied without opinion on September 8, 1970 (R 20, 75 *et seq.*). Trial and conviction followed.[3]

10. At the trial, petitioner preserved his earlier objections by timely objection on the record to the introduction of the contraband and testimony in regard thereto. The objections were denied, and the seized material was introduced for the prosecution. By post-conviction stipulation entered into between petitioner and the State of New York (R 10), proper preservation of the constitutional objection was acknowledged (R 15) and it was agreed that the trial transcript need not be produced for appeal purposes (R 17), that appeal would be limited to the suppression issue (R 16) and that any reversal on the basis of the suppression ruling would necessarily require reversal of the conviction and dismissal of the indictment (R 11, 16).

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[3] After determination of the suppression motion, the case was transferred to the Supreme Court for trial before Walter J. Mahoney, Justice.

11. Timely appeal was taken to the Appellate Division, Fourth Department (R 7). Affirmance of the conviction resulted. The constitutional issue was specifically ruled upon by the appellate court (37 A. D. 2d 139, 322 N. Y. S. 2d 374). Pursuant to timely application, permission to appeal to the Court of Appeals was granted, and the conviction affirmed on the merits of petitioner's constitutional argument (30 N. Y. 2d 252). Petitioner's motion to amend the remittitur to reflect the actual consideration and determination of the issue of federal constitutionality was denied on the ground that such consideration was clearly apparent from the earlier opinion (Appendix H).

Reasons for Granting the Writ

12. The writ should be allowed because the highest court of the State of New York has decided a federal question of substance under the Fourth Amendment which has not heretofore been determined by this Court and, further, has done so in a manner which is probably not in accord with applicable decisions of this Court.

13. The decision of the court below (30 N. Y. 2d 252) permits issuance of a search warrant for specified premises before any crime has occurred at, or any contraband been delivered to, those premises, as long as there is substantial probability that the warrant will not be executed until after one of those events has occurred. The case is limited to the instance of seizable property which is "in transit" to the particular premises [in the *Baker* case, through the United States mail; in the companion *Glen* case, through a common carrier (30 N. Y. 2d at 257, 259-60)]. The scope of the decision is greater than merely delivery cases involving third party delivery services. It

will apply equally where arrival of the contraband at premises may be reasonably certain, although accomplished through the direct agency of a criminal participant. Such cases would include the prospective delivery of the fruits of a larceny to a planned drop-off point, the anticipated delivery of goods imported in violation of United States law by private persons, deliveries to a "fence", intended transshipment of merchandise by organized crime and innumerable other instances where the facts convince the issuing magistrate that there is "substantial probability" (30 N. Y. 2d at 259) that contraband will come to rest at a given place or in the possession of a given person at a future time.

14. If the court below has correctly decided the constitutional issue, the resulting power of courts to issue warrants for the search of as-yet untainted premises, based upon the happening of anticipated future events which (if they occur) would supply the missing links for probable cause, will greatly increase the police power and, *pro tanto,* diminish the protection of the citizen who becomes subject to the broader right of search. The "hated general writs of assistance" (30 N. Y. 2d at 259) will have been revived in a modern form.

15. It is no answer to the inherent threat to the civil liberties of the citizen to require that there be "*substantial probability* that the seizable property will be on the premises when searched" (30 N. Y. 2d at 259; emphasis added) and to state in the present context that the "crime and the person involved were committed by the train of circumstances already in process but short of consummation, so that in the natural course of events the crime would occur at the time and place with defendant's implication" (*Id.*). Defendant Baker's presence in Buffalo was unknown. His

involvement in the mailing of the package or its contraband contents was not shown. *People v. Baker,* 37 A. D. 2d at 141, 322 N. Y. S. 2d at 375-76, *supra.*[4] The addressee, on the other hand, short of the time of actual presence of the contraband at the apartment, had no ability to protect herself against search by reporting the matter to the police or taking other lawful action to divest her apartment of the narcotics. (*Cf.* Memorandum Decision, Mattina, J., Appendix D, at page 35.) Approval of prospective searches, absent presence of the contraband on the premises, subjects the unwitting citizen to invasion of his privacy based on nothing more than events set in motion by others, which have not yet touched him or his abode in any way.

16. The rule announced in this case marks a new departure in the law of search and seizure. Only two courts had previously dealt with in-transit "delayed execution warrants" (30 N. Y. 2d at 257): *Alvidres v. Superior Court,* 12 Cal. App. 3d 575, 90 Cal. Rptr. 682 (2d Dist. 1970) and *United States ex rel. Beal v. Skaff,* 418 F. 2d 430 (7th Cir. 1969).[5] Both sustained issuance of the warrant. Both, however, involved delivery which was imminently scheduled—within an hour of the application for the warrant. In *Beal v. Skaff,* the warrant was issued within one-half hour of the scheduled delivery at a place remote from the place to be searched, rendering arrival of the warrant at the place to be searched before scheduled delivery physically impossible. The court indicated that, but for this objective proximity of time making premature execution

[4] Petitioner disclaims mailing or having prior knowledge of the mailed narcotics. See his affidavit of September 8, 1970, at R 82.

[5] But see *State v. Waits,* 185 Neb. 780, 178 N. W. 2d 774 (1970), also involving in-transit contraband. The warrant was justified, however, on other surrounding evidence giving independent support for immediate issuance.

impossible, the warrant would have been improper. "Judicial control" over the timing of execution in relation to the presence of contraband at the premises would have been lost. *Beal,* 418 F. 2d at 433.

17. The same factual limitation was apparently present in *Alvidres,* the warrant having been applied for within an hour of delivery. The court's rationale was not so limited, however. Building from *Beal, Alvidres* approved the advance issuance of the warrant without limitation as to time, except the state statute's general ten-day limit for the execution of any outstanding warrant.

18. The traditional view has been that advance issuance of a warrant based upon anticipated future facts is constitutionally anathema. See *State v. Guthrie,* 90 Me. 448, 453, 38 A. 368, 369-70 (1897):

> "It is suggested that the prosecution often needs to obtain search warrants in advance, in order to have them in readiness to seize the liquors at the moment of deposit before they can be concealed; that such a procedure is very efficacious and even essential to circumvent the cunning of liquor sellers; and that the rule here evolved will nullify it. If such a practice obtains, it should be nullified.
>
> "No prosecution can be lawfully begun, no criminal process lawfully issued, before the offense is committed."

This principle has been widely applied. *United States ex rel. Campbell v. Rundle,* 327 F. 2d 153, 162-63 (3d Cir. 1964); *Mitchell v. United States* (*conc. op.* Bazelon, J.), 258 F. 2d 435, 437 (D. C. Cir. 1958); *McDaniel v. State,* 197 Ind. 179, 150 N. E. 50, 52 (1926); *State v. Perkins,* 220 Mo. App. 349, 285 S. W. 1021, 1023 (1926); *State v. Miller,* 329 Mo. 855, 46 S. W. 2d 541, 542 (1932); and *State v. Ferrigno,* 5 Conn. Cir. 468, 256 A. 2d 795, 797 (14th Cir. 1969).

19. This Court has repeatedly held that the probable cause necessary to sustain a search must encompass two separate elements: (1) the existence of at least part of the justifying contraband or criminal activity at the premises to be searched and (2) existence of that relationship at the date of issuance of the warrant or performance of a non-warrant search *Dumbra v. United States*, 268 U. S. 435, 441 (1925); *Carroll v. United States*, 267 U. S. 132, 154, 162 (1925); *Henry v. United States*, 361 U. S. 98, 103 (1959). Compare *Spinelli v. United States*, 382 F. 2d 871, 879-80 (8th Cir. 1967), *rev'd on other grounds*, 393 U. S. 410 (1969). Construing both the Fourth Amendment and an applicable federal statute on the issuance of federal search warrants as requiring liberal construction in favor of the individual, this Court has held that the proof before the issuing magistrate must "be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time". *Sgro v. United States*, 287 U. S. 206, at 210-11 (1932). This accords with the purpose of the search warrant, which is to justify seizure of the thing alleged, at that time, to be presently at the place to be searched. *Mitchell v. United States*, 258 F. 2d 435, 437 (D. C. Cir. 1958).

20. Events subsequent to the issuance of the warrant, including the successful execution of the warrant itself, provide no constitutional basis for the warrant. *United States v. Di Re*, 332 U. S. 581, 595 (1948). A subsequent delivery of the contraband to the premises should do no more to validate the previously issued warrant. The issue on a narcotics warrant application is, invariably, whether there is a substantial basis for the magistrate "to conclude that narcotics *were probably present in the apartment*" at the time he issues his warrant. *Jones v. United States*, 362 U. S. 257, 271 (1960) [emphasis added]; *cf. Spinelli v. United States*, 393 U. S. 410, 413 (1969); *United States v.*

Harris, 403 U. S. 573, 584 (1971). On January 9, 1970, the police had sufficient basis to obtain a warrant to seize the package at the post office. Assuming defendant was involved sufficiently to be arrested at that point [but see *People v. Baker*, 37 A. D. 2d at 141, 322 N. Y. S. 2d at 375-76], the probable cause justifying his arrest would not necessarily justify a search warrant for the apartment. *United States v. Lucarz*, 430 F. 2d 1051, 1055 (9th Cir. 1970); *United States v. Flanagan*, 423 F. 2d 745 (5th Cir. 1970).

21. The *Alvidres* decision assumed from the extension of Fourth Amendment protections to "bugging" or wiretapping situations (where the warrant must, of necessity, be issued in advance of the existence of the item to be "seized", the spoken word) that prospective warrants for tangible items are equally proper. *Alvidres v. Superior Court, supra*, 12 Cal. App. 3d at 581-82, 90 Cal. Rptr. at 686. However, while this Court has allowed advance judicial approval of surveillance for *future* conversations, it has nonetheless insisted on a showing that "a specific criminal offense" has been committed. *Berger v. New York*, 388 U. S. 41, 57 (1967). The basic requirement of the Fourth Amendment is "to keep the state out of constitutionally protected areas [here, the Baker apartment] until it has reason to believe that a specific crime has been or is being committed . . . ." *Berger v. New York, supra* at 59. Compare *Katz v. United States*, 389 U. S. 347 (1967), where (at 354) the Court required a showing of a "strong probability that Katz *was using* the telephone in question . . . in violation of federal law" before the tapping warrant could issue. Application of Fourth Amendment principles to the "bugging" context was clearly an *extension* of constitutional protections [*Alderman v. United States*, 394 U. S. 165, 179 (1969)], not a basis to limit protections previously accorded regarding seizure of tangible materials.

22. The rule of the New York Court of Appeals in *Baker* flies in the face of the clearly defined limit established by this Court. If the state court's ruling is approved, the issue on future warrant applications will be whether the justification for search will happen in the future. In the past, the question has been whether the justifying fact has occurred. Prediction will be substituted for fact determination.

23. The *Beal* and *Alvidres* decisions, both by lower courts, represented sharp breaks with the earlier developed law of searches and seizures. Whether these holdings, under the limited fact situations there present, will ultimately prevail as valid precedent has not yet been determined. There is certainly no basis for the extension of those decisions to the case at bar, however. The issuance of an executory warrant, to take life like a last will and testament upon the occurrence of a future event days or weeks later, is wholly outside permissible constitutional bounds—investing in the discretion of the police the determination when, if ever, probable cause has come into existence so as to permit execution of a warrant theretofore legally inoperative. The matter is compounded grievously, however, when, as here, a warrant commanding an immediate search (while all must agree that no probable cause existed for immediate search) will nonetheless survive for search at a future time. In such an event, the police have in hand a general writ of assistance by which they may search an entire apartment at any time if they merely first determine the existence of facts supporting an inference that contraband is now on the premises (whether or not it was the contraband originally contemplated—that at the post office).[6]

[6] The warrant directed seizure of "a dangerous drug" at the apartment, without limiting it to the drug in the package (R 52).

24. The warrant here (Appendix G), however, determined in a formulary manner that probable cause existed to believe that narcotics were located at the apartment at that time. The case presents the question whether, in the face of a direction to make immediate search, the authorities may purposely withhold execution for a full week to permit delivery of narcotics to the premises. The federal courts are in disagreement. See *House v. United States*, 411 F. 2d 725 (D. C. Cir. 1969); *United States v. Bradley*, 428 F. 2d 1013 (5th Cir. 1970). Contrast *United States v. Dunnings*, 425 F. 2d 836 (2d Cir. 1969); *United States v. Nepstead*, 424 F. 2d 269 (9th Cir. 1970). Prejudice and the standing of petitioner to contest the intentional delay results from the interim arrival of contraband at the premises. *Spinelli v. United States*, 382 F. 2d 871, 886, *supra*.

25. The case at bar presents an opportunity to settle the basic question promptly, before the presently developed law is relied on further by law enforcement agencies. With the increase in the narcotics problem, the return of servicemen and travelers from overseas points and the inevitable increase of interstate shipment of contraband—both domestically and internationally—the proper determination of the validity of executory search warrants is of vital importance. This is so not only for defendants in criminal prosecutions (and citizens subjected to search but never charged) but also for the police agencies charged with enforcement of the law. There were no independent state grounds by which the conviction of Baker could be sustained. The issue is fully developed and ripe for decision on a nationwide basis.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the Court of Appeals of the State of New York in proper form, that this Court thereafter review and determine this cause on the merits and that your petitioner have such other and further relief as to the Court may seem just and proper.

Dated: June 7, 1972.

Respectfully submitted:

s/ William H. Gardner,
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APPENDIX A

Opinion of the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,
Respondent,
vs.
J. CHRISTOPHER GLEN,
Appellant.

PEOPLE OF THE STATE OF NEW YORK,
Respondent,
vs.
STANFORD T. BAKER, JR.,
Appellant.

Docket No. 433
Entered March 24, 1972
Filed Erie County Clerk
March 30, 1972
30 N. Y. 2d 252

BREITEL, J. These cases present the common question whether a search warrant may be issued prior to the imminent or scheduled arrival of seizable property designated in the warrant, marijuana in these instances, on the premises or person to be searched. Appellants, defendants in unrelated possession prosecutions, argue that a warrant for the search and seizure of contraband in transit may not issue until the seizable property has come to rest with the person or at the place designated to be searched. Subordinate issues presented in Glen's appeal turn on the sufficiency of affidavits on a motion to nullify the warrant and suppress evidence seized.

Defendants were separately convicted of lesser degrees of possession of dangerous drugs. Baker was fined $250 following a jury trial for possession in the sixth degree (Penal Law, § 220.05). Glen was sentenced upon a guilty plea to a maximum of four years for possession in the fifth degree (Penal Law, § 220.10). Both convictions were unanimously affirmed by the Appellate Division on separate appeals (Baker judgment affd. with opn. 37 A D 2d 139, Glen judgment affd. 37 A D 2d 692). Both defendants raised the basic issues in unsuccessful pretrial motions to suppress.

The convictions should be affirmed. Neither the Constitution nor relevant sections of the former Code of Criminal Procedure forbid issuance of a search warrant in advance of the imminent or scheduled receipt of seizable property by the person or at the premises designated in the warrant. In the *Glen* case a hearing was properly denied on the original motion to suppress since the supporting affidavits did not raise issues of fact and the papers in support of the warrant were legally sufficient. Denial of subsequent motions by Glen seeking identical relief rested in the discretion of the hearing court.

The facts are not in dispute. In *Baker* a narcotics detective in the Buffalo Police Department averred before the issuing Judge on January 9, 1970 that an overseas package addressed to Barbara Fay Baker, defendant's wife, had been inspected by customs in San Francisco and found to contain marijuana. The package was resealed and shipped to Buffalo, where it was examined by postal authorities and its contents confirmed. The police officer stated that the package was scheduled for delivery on January 16, one

week later. Upon these averments a warrant issued authorizing a search of defendant's premises. The warrant did not specify a particular time for the search although the statutory form warrant directs immediate execution (former Code Crim. Pro., § 797). In fact the search under the warrant was made, as obviously intended by the issuing Judge, on January 16, the delivery date specified in the affidavit. The police officers, after observing delivery of the parcel, entered and searched the premises, confiscated the marijuana, and arrested defendant and his wife.

In the *Glen* case the warrant affidavit averred that a package containing narcotics and consigned to Glen, a known drug possessor, was due to arrive at the local Greyhound Bus Depot in Canandaigua, New York. The affidavit added that Glen had called for the package earlier that morning but it had not yet arrived. The affiant's information was based on a tip from an informer whose reliability was adequately demonstrated. The warrant issued October 29, 1969 and the officers were shortly advised by a Greyhound clerk that the package had arrived. When the parcel went uncalled for that day, the officers removed it and examined it at the Sheriff's office. They found marijuana. The package was returned to the depot the following morning and the surveillance continued. At midday Glen arrived, accepted delivery and was arrested leaving the depot.

The principal issue turns on defendants' argument that a necessary condition precedent to the issuance of a search warrant is the present unlawful possession of seizable property on the person or at the place designated in the warrant. Defendants urge that the warrants are invalid because no crime had been committed prior to their issuance

and there was no present and continuing possession of the contraband at the time of issuance. The Appellate Division in the *Baker* appeal stated, and correctly so it would seem, that a showing of possession to occur shortly is sufficient (37 A D 2d, at p. 141). In the *Glen* appeal a separate grievance is the denial of a hearing on the first motion to suppress and the summary disposition of renewed motions.

The validity of delayed execution warrants for seizable property in transit, supported by probable cause of imminent or scheduled arrival at a designated place or by a designated person, has been rarely considered. Indeed, evidently only two reported cases have discussed the issue, both sustaining the warrant (*Alvidres v. Superior Ct.*, 12 Cal. App. 3d 575; *cf. United States ex rel. Beal v. Skaff*, 418 F. 2d 430, 433).

Preliminarily, the issue is peculiar to seizable property in transit. The police problem will often be whether to obtain a warrant in advance, or to seize the property, especially if contraband, on arrival without a warrant. The surveilling officers who intercepted Glen, assuming no intervening illegality, could have done so without obtaining a warrant (see *People v. Reisman*, 29 N Y 2d 278; *Hernandez v. United States*, 353 F. 2d 624, cert. den. 384 U. S. 1008, for warrantless searches in other shipment cases). In the *Baker* case the power to make a warrantless search may be less certain, but often the possibility of removal, destruction, or concealment by the occupants may justify an immediate search without a warrant (*cf. Chapman v. United States*, 365 U. S. 610, 614-615; *United States v. Jeffers*, 342 U. S. 48, 51-52; *Hernandez v. United States*, 353 F. 2d 624, *supra*). Greater latitude is indicated where the police

resort to warrant procedure rather than relying on the power to search without a warrant. The purpose, of course, is to encourage the use of warrants (*Jones v. United States*, 362 U. S. 257, 270; accord, *United States v. Ventresca*, 380 U. S. 102, 106-107). Hence, the instant cases present laudable efforts by the police to anticipate the undoubtedly imminent or early-scheduled arrival of seizable articles, if warrants were to be used and application made with opportunity to add to the supporting evidence as the issuing Judge might require. With these considerations in mind, the issue is whether there is a constitutional or statutory bar to a prospective warrant.

The State Constitution contains no limitations of time or strictures on present possession with respect to search warrants. It provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (art. I, § 12). The Federal constitutional provision is identical (4th Amdt.). The remaining question then is whether a prospective warrant, by not being sufficiently limited, may allow an unreasonable search, particularly because it involves some discretion in the executing officer whether and when to execute it. Of course, even when there is present possession of the seizable property the officer has a minimal discretion not to execute the warrant if it should appear to him, from whatever source, that the possession is no longer the fact at the time of expected execution. At best, present possession is only probative of the likelihood of future possession. In cases

like these the certainty of future possession is greater or is often greater than that based on information of past and presumably current possession. Indeed, warrants based on stale information have been upheld (see *People v. Holton*, 326 Ill. 481, 10-day interval; *People v. DeGeovanni*, 326 Ill. 230, 5-day interval; *Syrakas v. State*, 227 Wis. 59, 9-day interval; *United States v. Fitzmaurice*, 45 F. 2d 133, 19-day interval; see, generally, Ann., Search Warrant —Affidavit—Sufficiency, 100 ALR 2d 526).

The ultimate answer to the problem is that as long as the evidence creates substantial probability that the seizable property will be on the premises when searched, the warrant should be sustained. To be sure, where there is no present possession the supporting evidence for the prospective warrant must be strong that the particular possession of particular property will occur and that the elements to bring about that possession are in process and will result in the possession at the time and place specified. Otherwise, the hated general writs of assistance of pre-Revolutionary times would be revived, in effect, despite the constitutional limitations. Moreover, the issuing Judge should be satisfied that there is no likelihood that the warrant will be executed prematurely. In the *Baker* case the fact that the package was under the absolute control of the postal authorities made relatively certain delivery at the time specified in the affidavit. In the *Glen* case the reliability of the information and the earlier visit by the defendant not only supported the police expectation of delivery and possession but made it imminent and all but inevitable.

It is important to distinguish cases on which defendant Baker relies, cases which say or suggest that a warrant may not issue unless there is probable cause that a crime is now being committed, and rejecting the obtaining of warrants in advance (*e.g., State v. Guthrie*, 90 Me. 448, dictum). These cases reject, and properly so, as a basis for issuing a warrant, speculation or inference, however good, that a crime will be committed in the future at a certain place. That is not the situation where the crime and the person involved were committed by the train of circumstances already in process but short of consummation, so that in the natural course of events the crime would occur at the time and place with defendant's implication. Indeed, defendant Baker recognizes that "crimes in process" may support issuance of a warrant. Of course, in many kinds of organized crime the evidence supplied to obtain warrants does not relate to current crimes but past crimes with circumstances showing the likelihood of continuance of the same activity. In the present cases the evidence that there would be a consummated prospective crime was logically and probatively stronger. The necessary pieces were in motion and all but inevitably the pieces would fall into a set, at a later time, constituting the crime.

Constitutional objections aside, defendants point to statutory restrictions.

The former statute provided: "If the judge, justice or magistrate be satisfied of the existence of sufficient grounds for granting the application, and that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to any peace officer in his county or to any peace officer in the

city of New York if such warrant is issued in the city of New York, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge, justice, or magistrate." (Code Crim. Pro., § 796.) It does not contain any requirement of present possession of the seizable property. It does, however, direct search forthwith. The question then is whether the language is mandatory and to be read literally, or whether it reflects a directive to be followed without delay on the basis of facts alleged in obtaining the warrant. The statutory form of warrant follows the statute (Code Crim. Pro., § 797).

The command to execute "forthwith" has been defined to require reasonable promptness, and, therefore, allow, in a sense, "reasonable delay", under the circumstances of the case (*United States v. Dunnings*, 425 F. 2d 836, 840-841; *United States v. Nepstead*, 424 F. 2d 269, 270-271, cert. den. 400 U. S. 848; *House v. United States*, 411 F. 2d 725, 728; *Spinelli v. United States*, 382 F. 2d 871, 885, revd. on other grounds 393 U. S. 410; *cf. United States v. Bradley*, 428 F. 2d 1013, 1015-1016). In the *Dunnings case* (*supra*) Judge FRIENDLY addressed himself to the problem presented by the word "forthwith", and at the same time noted the inescapable discretion vested in a police officer executing a warrant. He said: "Even if we were to think that the sole reason for the delay was to effectuate Dunnings' arrest, it would not follow that the search was invalid. It is by no means clear that the 'forthwith' phrase in Rule 41 (c) is a determination of an important policy rather than a belated echo of a medieval royal command. If the

agents had obtained an arrest warrant for Dunnings, they would have had a reasonable time within which to execute it. [cases cited] We fail to see why, when they obtained a search warrant, they were obliged to execute it in a manner that might well have prevented Dunnings' arrest, so long as they did execute it within 10 days and at a time when the probable cause recited in the affidavit continued [cases cited]" (p. 841). Significantly, the new Criminal Procedure Law now eliminates the references to "forthwith" and immediate execution (CPL 690.40, 690.45).

There was also in the statutes the requirement that: "A search warrant must be executed, and returned to the judge, justice or magistrate by whom it was issued, within ten days after its date. After the expiration of such time, the warrant, unless executed, is void." (Code Crim. Pro., § 802, subd. 1.) This provision suggests that forthwith execution does not mean immediately, but is qualified by the practicalities and exigencies that the executing officer faces in the performances of his duty. Some cases have so held, and stated only what the statute makes clear, namely, that the warrant must be executed and returned within 10 days. Stale warrants are void, as they should be. (*United States v. Dunnings*, 425 F. 2d 836, *supra; United States v. Nepstead*, 424 F. 2d 269, *supra; House v. United States*, 411 F. 2d 725, *supra; Spinelli v. United States*, 382 F. 2d 871, *supra.*)

On this analysis the requirement that the warrants be executed forthwith was not violated in the present cases. Nor did the issuing Judges act incorrectly. They have at least the same latitude in issuing warrants as is allowed the police in executing warrants.

A subordinate issue merely alluded to by the parties is whether the possibility that the warrants by their terms could have been executed prematurely (for example in the *Baker* case, before delivery of the package) renders the warrants invalid on their face. Certainly, the better practice would have been for the issuing Judge to require that the search be reasonably contemporaneous with delivery of the package or suitcase. Nevertheless, the fact that the warrant would on its face authorize an improper search does not undo it for all purposes. The defect is a technical one and may be disregarded since the warrants were executed at the only time practicable under the facts as set forth in the affidavits, and within the 10 days provided by statute and directed by the warrant on its face. Thus, that only a technical irregularity is involved is suggested by cases holding that the fact that a warrant improperly authorized a nighttime search did not make illegal a daytime search (*People v. Varney*, 32 A D 2d 181; see, also, *United States v. Bruzzit*, 53 F. 2d 219; *United States v. Fitzmaurice*, 45 F. 2d 133, *supra*).

In concluding this principal issue, it is worth repeating the admonition in *United States v. Ventresca* (380 U. S., at p. 108) that the requirements of the Fourth Amendment are "practical and not abstract" and that warrants should be scrutinized in a "commonsense and realistic fashion".

The surviving issue on the *Glen* appeal is the denial of a hearing on the motions to suppress. Glen moved in March, 1970, pursuant to section 813-c of the code, to suppress the evidence. The motion was denied in a memorandum without a hearing. The second and third motions in April and June of 1970 were denied because they sought the same

relief. No showing of newly-discovered evidence not available at the time of the first motion had been made.

The March motion was properly denied without a hearing. Before a hearing is required an issue of fact must be raised (*People v. Solimine*, 18 N Y 2d 477). Generally, the burden on a motion to suppress is on a defendant (*People v. Berrios*, 28 N Y 2d 361, 367; *People v. Alfinito*, 16 N Y 2d 181, 186). The affidavits of Glen and his counsel do not dispute the facts in the warrant application, the veracity of the affiant, or the manner in which the property was seized. On the narrow question of law whether the affidavit in support on the warrant was sufficient, the motion was, therefore, correctly decided.

The denial of the second and third motions lay in the unreviewable discretion of the hearing court (*cf.* 2A Weinstein-Korn-Miller, N. Y. Civ. Prac., ¶ 2221.03; Cohen and Karger, Powers of the New York Court of Appeals, p. 585). A defendant is entitled to one motion as of right. Section 813-d suggests as much; it provides that once a pretrial motion is denied the determination is final unless new additional evidence of unlawfulness is offered. The only new matter in the second and third motions which might have merited a hearing is the taking from the depot and examination of the suitcase at the Sheriff's office on October 29. The taking to confirm the presence of marijuana in the suitcase was not authorized by the warrant. Nevertheless, counsel for Glen was aware of the October 29 taking prior to the first motion, even referring to it on the argument of the motion, but the affidavits on neither side presented any facts on the initial temporary taking of the suitcase and its replacement. These facts were only

developed on the later motions. Consequently, the evidence of the initial temporary taking of the suitcase does not qualify as "newly discovered evidence".

In any event, if defendant Glen had raised a reviewable question as to the illegality of initial examination of his suitcase at the station house, it would make no difference. Assuming that examination were illegal it did not affect the eventful seizure. The warrant had been issued before on probable cause. It would have been executed at the proper time, even if the Deputy Sheriffs in their excess of zeal had not confirmed the presence of marijuana by the examination at the Sheriff's office (see *People v. Reisman*, 29 N Y 2d, at pp. 283-284).

Accordingly, the orders of the Appellate Division should be affirmed.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Jasen and Gibson concur.

In each case: Order affirmed.

APPENDIX B

Opinion of the Supreme Court, Appellate Division, Fourth Judicial Department

STATE OF NEW YORK

SUPREME COURT—FOURTH JUDICIAL DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

STANFORD T. BAKER, JR.,
Appellant.

Docket No. 319
Entered June 25, 1971
Filed Erie County Clerk
July 1, 1971
37 A. D. 2d 139
322 N. Y. S. 2d 374

Per Curiam. Defendant was convicted of unlawful possession of a dangerous drug on the basis of evidence seized pursuant to a search warrant. By stipulation of the parties, the sole issue raised on appeal is whether probable cause existed for issuance of the search warrant prior to the arrival of the package to be seized at the premises to which the warrant was directed.

On January 9, 1970, a detective assigned to the Narcotics Division of the Buffalo Police Department appeared before a Magistrate of the Buffalo City Court and made application for a warrant to search premises at 71 Arnold Street in that city for marijuana and a described package directed to the Arnold Street address, postmarked San Francisco and bearing defendant's name as return addressee. In his affidavit supporting the application the detective stated that, based upon information received from a named United States Customs agent and a named

Postal Inspector, the package had been opened by a customs employee during a routine inspection at the San Francisco post office, resealed and forwarded to Buffalo; that it had been reopened at the post office at Buffalo in his presence; that a compound in the package had been tested and found to be marijuana; that the package had been resealed and he was advised by postal authorities that it was scheduled for delivery on or about Janury 16, 1970; that his investigation revealed that on several occasion in the past mail had been accepted for defendant at 71 Arnold Street. The affiant further stated that, based on the foregoing reliable information and his personal knowledge "there is probable cause to believe" that marijuana "may be found" at the Arnold Street premises and he requested that the search might be made at any time due to the fact that evidence of narcotics can easily be destroyed or disposed of. The warrant, issued on the day of application, commanded a search of the Arnold Street premises and of any person to whom marijuana may have been delivered.

On January 16 the detective proceeded to the premises, observed the delivery being made, executed the warrant 17 minutes later and confiscated the marijuana and package described in the warrant.

In denying the motion to suppress, the court concluded that there was probable cause to believe defendant was guilty of a continuing crime of possession which started when defendant mailed the package, continued while it was in control of the postal authorities and extended through the time of delivery at the Arnold Street address where

defendant was present, and that the commission of this crime justified the issuance of the search warrant. However, there was nothing before the issuing Magistrate to support a conclusion that the package was mailed by defendant or that it was in his possession at any time prior to its delivery at 71 Arnold Street—a necessary factor if a continuing crime of possession was to form the basis for the issuance of the warrant. Consequently we do not adopt the above reasoning for upholding the warrant.

Without a continuing crime by defendant there was, nevertheless, probable cause demonstrated in the affidavit produced before the Magistrate to justify the issuance of the search warrant. The fact that the information detailed by the affiant showed that contraband would be on the premises to be searched within the 10-day period permitted by section 802 of the Code of Criminal Procedure for execution of a warrant, rather than at the time of issuance, does not negate probable cause (*United States ex rel. Beal v. Skaff*, 418 F. 2d 430; *Alvidres v. Superior Ct., County of Ventura*, 12 Cal. App. 3d 575; *cf. State v. Waits*, 185 Neb. 780). "Nowhere in either the federal or state constitutions * * * is there any language which would appear to prohibit the issuance of a warrant to search at a future time." (*Alvidres v. Superior Ct., County of Ventura, supra*, p. 581.) The test is whether probable cause existed to believe that execution of the warrant would not precede the commission of the crime or possession of the goods to be seized (*United States ex rel. Beal v. Skaff, supra*, p. 433). Here we are satisfied that probable cause did exist for the belief that the warrant would not be executed prior

to the delivery of the package: "[I]t is logical to assume that when officers obtain a warrant to search for and seize particular property which they have probable cause to believe will be on the premises at a specified future time, they would not be disposed to undermine the success of their efforts by premature execution of the warrant." (*Alvidres v. Superior Ct., County of Ventura, supra*, p. 579.) The issuing Magistrate had every reason to believe that the warrant would be executed not earlier than January 16, the day the package was scheduled for delivery by postal authorities, and that such execution would be within the time permitted by the Code of Criminal Procedure.

We conclude that the affidavit of probable cause was sufficient to support the issuance of the search warrant. Accordingly, the judgment of conviction should be affirmed.

Del Vecchio, J. P., Marsh, Gabrielli, Moule and Henry, JJ., concur.

Judgment unanimously affirmed.

APPENDIX C

Decision of Hon. Joseph S. Mattina, Erie County Judge, June 8, 1970

STATE OF NEW YORK

COUNTY COURT—County of Erie

PEOPLE OF THE STATE OF NEW YORK,

vs.

STANFORD T. BAKER, JR. and BARBARA BAKER,
Defendants.

Indictment No. 35,230
Entered June 8, 1970
Filed Erie County Clerk June 11, 1970
(Not published)

MATTINA, J.

The defendants are charged under the above indictment with Criminal Possession of a Dangerous Drug, Third Degree, and seek an order to suppress as evidence a quantity of marijuana on which the indictment is based. The evidence was obtained pursuant to a search warrant issued January 9, 1970 and executed on the 16th day of January 1970.

Defendants claim that the warrant was not based or issued upon requisite probable cause.

A hearing before this Court was held on the 7th day of April 1970. The warrant, supporting papers and return were examined. The hearing substantially explored through examination of the affiant, the veracity and sufficency of the supporting papers upon which the warrant was based. Also raised was the legal sufficiency of the

information contained therein, said information being based partly on other than the personal observation and knowledge of the affiant.

The hearing failed to impair the veracity of said information. As to the issue of firsthand knowledge and observation; there is no such requisite for a showing or probable cause. Here governmental and business records in part formed a basis for probable cause and not merely hearsay. Even hearsay evidence is competent for a showing of probable cause.

The warrant and supporting papers are sufficient on their face. The defendants' motions to suppress is denied.

Submit Order.

s/ JOSEPH S. MATTINA,
J. C. C.

Dated: Buffalo, New York, June 8, 1970.

APPENDIX D

Decision of Hon. Joseph S. Mattina, Erie County Judge, July 1, 1970

STATE OF NEW YORK

COUNTY COURT—COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK,

vs.

STANFORD T. BAKER, JR. and BARBARA BAKER,

Defendants.

Indictment No. 35,230
Entered July 1, 1970
Filed Erie County Clerk July 2, 1970
(Not published)

MATTINA, J.

The defendants, Stanford J. Baker, Jr. [*sic*] and Barbara Baker, seek on reargument of a motion, an order to suppress as evidence a quantity of marijuana upon which evidence, the above indictment is based. The evidence was obtained pursuant to a search warrant issued on January 9, 1970 and executed on the 16th day of January, 1970.

It is defendants' contention that a warrant may not issue upon information indicating that there will be possession of a narcotic drug when the mail is delivered but rather that the affiant, police officer, must establish that there was cause to believe that there was then, at the time of application for the warrant, an unlawful drug on the premises and not merely that it was on its way. It is claimed that the warrant was prematurely obtained.

The crime of possession is a continuing crime embracing such period of time as possession exists. The use of the United States mail is not an abandonment or reliquishment of ownership or dominion. Control is retained as to the place of delivery. A crime was in fact in progress when

the warrant was issued. It is immaterial if one or both of the named defendants were at each stage in the crime a known participant if at least one of the defendants was. The defendant addresser was in possession of the evidence when delivered to the defendant addressee's apartment as well as while said evidence was in transit inasmuch as he directed said evidence to be delivered there.

There was more than probable cause to believe a crime was being committed and that the evidence would be at a given location at a given time. Inasmuch as the delivery was arranged, there existed absolute certainty.

Although bound to uphold the constitutionality of the warrant, this Court feels obliged to direct criticism to the procedure followed here, to wit: the immediate execution of the warrant when the illegal evidence was delivered and the immediate arrest of the addressee. There was no opportunity given to the addressee to refuse, return or otherwise legally reject the illegal evidence. There was no showing of prior dealings by the addressee. There was no showing of possession by the addressee with any knowledge of the nature or character of the evidence. An arrest under these circumstances can result in irreparable harm and injustice. Fairness dictates a better procedure. The sufficiency of the arrest however does not bear upon the legality of the search itself or the warrant upon which the search was based.

The defendant's motion is denied.

Submit Order.

s/ JOSEPH S. MATTINA,
J. C. C.

Dated: Buffalo, New York, July 1, 1970.

APPENDIX E

Constitutional and Statutory Material

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Sec. 1.

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

N. Y. Code of Criminal Procedure, Sec. 796 (66 McKinney, Part 3, 1970 Pocket Part at 56), repealed by N. Y. Criminal Procedure Law (McKinney 1971) (effective Sept. 1, 1971):

"If the judge, justice or magistrate be satisfied of the existence of sufficient grounds for granting the application, and that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to any peace officer in his county, or to any peace officer in the city of New York if such warrant is issued in the city of New York, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge, justice or magistrate."

N. Y. Code of Criminal Procedure, Sec. 797 (66 McKinney, Part 3, 1970 Pocket Part at 58), repealed by N. Y. Criminal Procedure Law (McKinney 1971) (effective Sept. 1, 1971):

"The warrant must be in substantially the following form:

'(Name) Court

'County of (name)

'In the name of the people of the State of New York:

'To any peace officer in (the city of New York or in) the county of (name).

'Proof by affidavit (or deposition) having been made this day before me by (name every person whose affidavit or deposition has been taken) that there is probable cause for believing that (certain property has been stolen or embezzled) or (certain property has been used or is possessed with intent to be used as a means of committing a crime or offense) or (certain property is concealed to prevent a crime or offense from being discovered) or (certain property is unlawfully possessed) or (certain property constitutes evidence of a crime or tends to show that a particular person has committed a crime);

'You are therefore commanded, between 6:00 A. M. and 9:00 P. M. (or at any time of the day or night), to make an immediate search of (identify premises) occupied by A. B. and of the person of A. B. and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for (describe property) and if you find any such property or any part thereof to bring it before me at (name of court and location).

'Dated at (city, town, etc.) this day of , nineteen hundred .

'C. J.
'(title)' "

Constitutional and Statutory Material

N. Y. Code of Criminal Procedure, Sec. 802 (66 McKinney, Part 3, 1970 Pocket Part at 65), repealed by N. Y. Criminal Procedure Law (McKinney 1971) (effective Sept. 1, 1971):

> "1. A search warrant must be executed, and returned to the judge, justice or magistrate by whom it was issued, within ten days after its date. After the expiration of such time, the warrant, unless executed, is void. . . ."

APPENDIX F

Affidavit for Warrant, January 9, 1970

COUNTY COURT—COUNTY OF ERIE[1]

In the matter of *Vernon H. Schack, Detective, Dept of Police Buffalo N. Y.*

The application of *Vernon H. Schack* for a warrant authorizing the search of *71 Arnold St. upper apartment* occupied by *Barbera* [*sic*] *Fay AKA Bobby Fahy* for certain property to wit: *A dangerous drug to include marihuana, a grey-blue suede leather coat and a package postmarked APO San Francisco #96225 and addressed to Bobby Fahy 71 Arnold St. Buffalo 14213 NY, and sent by one Stanly* [*sic*] *Baker whose return address is listed on the upper left of said package, and is listed as Batt. B, 1st. Batt., 8th Artill. APO San Francisco #96225. Also any property to identify the owner of leasee of said premises, and any correspondence relating to said package or contents* which property is *in his possession or control in violation of sections 220.05, 220.15, and 220.20 of the New York Penal Law.*

STATE OF NEW YORK, }
COUNTY OF ERIE. } ss.:

Vernon H. Schack, being duly sworn, deposes and says:

1. I am *a detective assigned to the narcotic squad of the Dept. of Police Buffalo, N. Y.*

2. I have information based upon *facts received* from *Treasury Special Agent U. S. Customs RICHARD E. PYNE and U. S. POSTAL INSPECTOR KENNETH E. RATTS.*

TO WITT, [*sic*] *that there is a package at the U. S. Post office 1200 William St. Buffalo, N. Y. addressed to one BOBBY FAHY 71 Arnold St. Buffalo 14213 NY. This package*

[1] The italicized portion indicates language typed on the original. The remaining portion is part of the printed form on the original.

is being held in room #214 U. S. Post Office and lists one Sgt. STAN BAKER as the sender, whose return address is shown on the upper left of the package as APO San Francisco #96255 Battery B 1st. Battalion 8th Artillery.

This package was opened for inspection in the San Francisco Post Office by U. S. Custom employee DEWEY A. DELLINGER V. O. P. during the routine permance [sic] of his duties according to Title 19 U. S. Code 1581-b (Authority to search International mail) The package was then resealed and forewarded [sic] to Buffalo N. Y. in registered and locked mail pouch. The lock register #6080-288 being the same when pouch was closed in San Francisco and when opened in Buffalo N. Y.

The package was reopened in Buffalo N. Y. on January 6, 1970 in room #214 U. S. Post Office 1200 William St. 12:25 PM, in the presence of this deponent and Spec. Agt. R. Pyne and U. S. Postal Insp. K. Ratts. All present observed a bluish grey suede coat and two packages containing a green vegetable compound present in the package addressed to Bobby Fahy 71 Arnold St. Buffalo N.Y. A sample (.08) gramms [sic] of the vegetable matter was removed and submitted to the Buffalo Police Laboratory for testing. The test proved positive for marihuana. The package was then resealed and made ready for delivery.

Further investigation by your deponent revealed that one Barbera [sic] Fay AKA as Fahy is known as "BOBBY", and that she has on several occasions in the past accepted mail for one Stan Baker, at 71 Arnold St. Buffalo N. Y. Said Stan Baker Sgt. APO San Francisco 96225 Batt. -B 1st. Batt. -8th. Artill. is the name appearing on the package as return address.

Deponent further states that he has been advised by Postal Authorities that the said package is scheduled for delivery on or about the 16th day of January 1970.

3. Based upon the foregoing reliable information and upon my personal knowledge as aforesaid, there is probable cause to believe that the following property, *to wit: a dangerous drug, marihuana.*

It is respectfully requested that search of said premises may be made at any time of the day, and that notice of authority and purpose be dispensed with, due to the fact that narcotic evidence can easily be destroyed, or disposed of, all pursuant of section 799–B of the Code of Criminal Procedure.

and may be found in the possession of *Barbera* [*sic*] *Fay AKA Bobby Fahy* and at premises *71 Arnold St. upper apartment, Buffalo N. Y.*

WHEREFORE, I respectfully request that the Court issue a warrant and order of seizure in the form annexed authorizing the search of premises *71 Arnold St. upper apartment, Buffalo N. Y.* and of the person of *Barbera* [*sic*] *Fay AKA Bobby Fahy, and of any other person who may be found to have such property in their possession or control,* and directing that if such property or evidence or any part thereof be found that it be seized and brought before the Court, together with such other and further relief as the Court may deem proper.

No previous application in this matter has been made in this or any other Court or to any other judge, justice or magistrate.

s/ VERNON H. SCHACK

(JURAT)

APPENDIX G

Search Warrant, January 9, 1970

City[1] COURT:
COUNTY OF ERIE
City of Buffalo
State of New York

In the Name of the People of the State of New York:

To any Peace Officer in the County of Erie:

City of Buffalo: State of New York

Proof, by affidavit, having been this day made before me, by *Detective Vernon H. Schack Dept. of Police Buffalo N. Y.* that there is probable cause for believing that (delete inapplicable portions) certain property has been used or is possessed with intent to be used as a means for committing a crime or offense *of sections 220.05, 220.15, 220.20 and 220.45 of the New York State Penal Law, certain* property is concealed to prevent a crime or offense from being discovered, *and* certain property is unlawfully possessed *by Barbera* [*sic*] *Fay AKA. Bobby Fahy.*

You Are, Therefore, Commaned, at any any [*sic*] time of the day or night, to make an immediate search of *of* [*sic*] *that portion of the premises commonly known as 71 Arnold St. upper apartment Buffalo New York and further such warrant may be executed without announcement of authority and purpose according to section 799–B of the Code of Criminal Procedure*, occupied by *Barbera* [*sic*] *Fay AKA Bobby Fahy* and of the person of *Barbera* [*sic*] *Fay AKA Bobby Fahy* and of any other person who may

[1] The italicized portion indicates language typed on the original. The remaining portion is part of the printed form on the original.

be found to have such property in his possession or under his control or to whom such property may have been delivered, for the following property: *to wit:*

A dangerous drug, to include, marihuana, and any personal property to identify the owner or leasee of the said premises and a package containing a blue grey suede coat. Package addressed to Bobby Fahy and postmarked APO San Franscisco 12/16/69. and sent by one Stanley Baker APO San Francisco 96225. Batt.–B ist. Batt. 8th Artil. Address on said package reading as 71 Arnold St. Buffalo 14213 NY. Also any correspondence relating to said package or the contents thereof.

and if you find the same or any part thereof, to bring it forthwith before me, at *City* Court, in the City of Buffalo, County of Erie, N. Y.

Dated at the said City of Buffalo, County of Erie, N. Y. the *9th day* of *January,* 1970.

s/ THEODORE S. KASLER,
City Court Judge, City of Buffalo.

APPENDIX H

Order Denying Amendment of Remittitur

STATE OF NEW YORK

COURT OF APPEALS

Mo. No. 373.

THE PEOPLE &c.,
Respondent,

vs.

STANFORD T. BAKER, JR.,
Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied upon the ground the opinion of this Court indicates that the constitutional argument raised was passed upon (30 N. Y. 2d).

s/ GLEASON KIMBALL,
Deputy Clerk.

(SEAL)

April 27, 1972.

APPENDIX I

Judgment of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 24th day of March in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding*.

RAYMOND J. CANNON, *Clerk*.

REMITTITUR March 24, 1972.

4. No. 433. 71

THE PEOPLE &c.,
Respondent,

vs.

STANFORD T. BAKER, JR.,
Appellant.

BE IT REMEMBERED, That on the 20th day of September in the year of our Lord one thousand nine hundred and seventy-one, Stanford T. Baker, Jr., the appellant in this cause, came here unto the Court of Appeals, by Hodgson, Russ, Andrews, Woods & Goodyear, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department.

And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Michael F. Dillon, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William H. Gardner, of counsel for the appellant, and by Mrs. Judith Blake Manzella, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Date of Entry: March 24, 1972.

FILE COPY

Supreme Court, U. S.
FILED
JUL 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1619

STANFORD T. BAKER, JR.,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

MICHAEL F. DILLON,
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JUDITH BLAKE MANZELLA,
Assistant District Attorney,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1619

STANFORD T. BAKER, JR.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorati to the New York State Court of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The unreported memorandum opinions of the Erie County Court, denying petitioner's motion to suppress evidence, are reproduced in the petition as Appendices B and C. The judgment of conviction, including the order of denial of suppression, was unanimously affirmed by the New York State Supreme Court, Appellate Division, Fourth Judicial Department by order entered June 25th, 1971, reported at 37 A. D. 2d 139. The opinion of the New York State Court of Appeals, unanimously affirming the order of the intermediate appellate court, is reported at 30 N. Y. 2d 252 (March 24th, 1972).

Jurisdiction

Jurisdiction is sought by petitioner pursuant to Title 28, United States Code, Section 1257, Subdivision 3. The order and judgment of the New York State Court of Appeals, the highest state court in which review may be obtained, was entered March 24th, 1972 and entered in the office of the Clerk of Erie County on March 30th, 1972. The petition for a writ of certiorari was docketed in the Supreme Court of the United States on June 14th, 1972. The petition was received by the office of the District Attorney of Erie County on June 8th, 1972.

Question Presented

1. Is a search warrant properly issued upon existing probable cause to believe that a substance known to be contraband will be (has been arranged to be) delivered to specific premises at a specified future time?

Statement

The petitioner, and another,[1] were indicted by an Erie County Court Grand Jury on January 30th, 1970, charged with Criminal Possession of a Dangerous Drug in the Third Degree, a felony, in violation of Section 220.20(b)(ii), Penal Law. A plea of not guilty was entered.

A hearing on the petitioner's motion to suppress evidence was held on April 7th, 1970; decision was reserved. Following the issuance of a memorandum decision of denial, motion for re-argument was made and granted. After re-argument, a further memorandum decision, denying the

[1] The Indictment against the co-defendant was dismissed for insufficiency of evidence before the Grand Jury of that co-defendant's knowing possession.

motion, was issued. Application for further re-hearing was denied. An order denying the motion to suppress evidence was granted on October 14th, 1970.

Thereafter, petitioner moved for inspection of the minutes of the Grand Jury and for dismissal of the Indictment. That motion was denied.

An order transferring the Indictment to the Supreme Court, Erie County, was entered on November 16th, 1970. Trial commenced on November 17th, 1970 and continued through November 24th, 1970 when the jury returned its verdict finding the petitioner guilty of Criminal Possession of a Dangerous Drug in the Sixth Degree, a misdemeanor.

The petitioner was arraigned for sentence on January 12th, 1971: he was fined two hundred and fifty dollars.

Notice of appeal, to the Supreme Court, Appellate Division, Fourth Judicial Department, was timely filed. Pursuant to stipulation between the parties, and approved by a Justice of the New York Supreme Court, the single question on appeal is the propriety of the issuance of the search warrant.

By order of the Supreme Court, Appellate Division, Fourth Judicial Department, the judgment of conviction was unanimously affirmed (37 A. D. 2d 139).

Upon application timely made, an Associate Judge of the Court of Appeals granted leave to appeal to that Court. Notice of appeal was filed thereafter. The order of the Supreme Court, Appellate Division, affirming the judgment of conviction, was unanimously affirmed (30 N. Y. 2d 252). A subsequent motion to amend the remittitur was denied, on the ground that the opinion of the Court indicted that the constitutional argument raised was passed upon.

No question has been raised on the appeal with reference to the facts adduced at trial. The facts surrounding the issuance and execution of the search warrant are as follows:

Vernon Schack, of the Buffalo Police Department Narcotics Bureau, testified that he personally appeared before the Hon. Theodore Kasler, Associate Judge of the City Court of Buffalo on January 9th, 1970, for the purpose of obtaining a search warrant (104-105).[2] He presented an affidavit in support of his application (105). The officer stated that he received information, through a chain of evidence report filed with a postal inspector at the United States Post Office, that one Dewey Dellinger had opened a package in San Francisco (108-109) during the routine performance of his duties, according to Title 19, United States Code 1581-B. The package was re-sealed and forwarded to Buffalo in a registered and locked mail pouch, the lock register being the same when closed in San Francisco as when opened in Buffalo (53). Officer Schack was present when the package was opened in Buffalo, and he examined that package at the Buffalo Post Office on January 6th, 1970 (113). A sample of greenish vegetable material was taken from the package and delivered to the Buffalo Police Laboratory (117) where it was found to be cannabis (119). Officer Schack conducted an investigation and learned, from postal authorities, that Barbara Fay Baker, the addressee on the package, had in the past accepted mail for one Stan Baker, the addressor on the package (122). Officer Schack then received information, from Postal Inspector Ratts, that the package was scheduled for delivery on January 16th, 1970 (124). All of his information was contained in the affidavit sup-

[2] Numerals in parentheses refer to pages of the joint appendix.

porting the officer's application for a search warrant (57-59). The search warrant was issued, on January 9th, 1970, authorizing a search of premises known as 71 Arnold Street, upper apartment, Buffalo, New York (50-52).

Officer Schack arrived in the area of the premises at approximately seven-thirty a. m. on January 16th, 1970 (131, 134), and waited for the arrival of the mail truck (132). The truck arrived at seven-thirty-nine a. m., and delivered the package (134). At seven-fifty-six a. m., the officers rang the doorbell and conducted the search (135).

After the execution of the warrant an inventory was made and the property was returned to the issuing magistrate who directed that the property seized remain in the custody of the Buffalo Police Department, subject to court order (55).

REASONS FOR OPPOSING THE WRIT

POINT ONE

No constitutional or statutory violation occurred through issuance of a search warrant based upon present knowledge of existing probable cause in advance of scheduled receipt of contraband on specified premises.

The proceedings for which review by this Court is now sought originated in the Erie County Court on a motion to suppress evidence seized as a result of a search pursuant to a search warrant. The single question in contention is the propriety of the issuance of the warrant to be executed seven days later—when the property to be seized was arranged to be at the designated premises. There is no argument with reference to the specificity of the premises to be searched, or the certainty that the package scheduled

for delivery contained contraband. There exists no difficulty with the reliability or credibility of the underlying information. There is only the most remote possibility of failure of delivery of the contraband to the premises. There is no evidentiary problem of knowledge or intent with regard to possession, as review has been limited to the single issue of the issuance of the warrant. In the instant matter the New York courts have approved a situation where the police, with strong probable cause to believe that known contraband was scheduled to be delivered to particular premises, presented their information to a detached magistrate and received judicial sanction to search for and seize property the possession of which is unlawful. The New York courts have determined that no state statute was violated by this procedure. The New York courts have determined that no state or federal constitutional provision requires the police to sit back and observe the physical delivery of a package of contraband in transit before applying to a magistrate for authority to seize it, and thereby risking the possibility of removal, destruction or concealment of the contraband. It is submitted that the state determination is logical, reasonable, and in full accord with the decisions of this Court interpreting Fourth Amendment constitutional issues.

The New York Court of Appeals noted particularly that "[N]either the Constitution nor relevant sections of the former Code of Criminal Procedure forbid issuance of a search warrant in advance of the imminent or scheduled receipt of seizable property by the person or at the premises designated in the warrant" (*People v. Glen (Baker)*, 30 N. Y. 2d 252 at 256). In quoting the State Constitution and the identical federal constitutional provision in the Fourth Amendment, the Court observed that it is clear that neither document contains limitations of time or

strictures on present possession with respect to search warrants. Although the usual situation involves probable cause determined on the basis of past (and presumably continuing) crimes, there is no reason to disallow a finding of probable cause on future and virtually certain continuing physical possession of contraband. Unlike the situation of a warrantless search incident to arrest, there is no requirement that a crime be completed before a search warrant may be issued. The opinions below, then, are in no way in conflict with previously announced constitutional guarantees.

Nor did the New York courts decide this matter in a manner not in accord with other applicable decisions of this Court. The decision below turned, ultimately, on whether a prospective warrant, by not being sufficiently limited, might allow an unreasonable search through the involvement of some discretion with the executing officer. Applying proper constitutional principles, the Court found no such danger: there is always some discretion vested in the officer which can be controlled by invocation of the exclusionary rule upon the appropriate motion; the danger of non-occurrence of one fact contributing to probable cause is greater in the usual case of past criminal activity than in the instant case where the element of delivery is a readily apparent fact. The Court below emphasized the need for great strength in the supporting evidence for a prospective warrant, thus demonstrating full appreciation of this Court's decisions in the area and following them to the point of even greater stringency.

Although the cases are legion where a present or past crime is the basis for issuance of a search warrant, they are not here controlling as there is no present crime involved in the instant matter. The search warrant was not

based on the possibility of the future crime of possession but on existing facts establishing probable cause to believe that a substance tested and proved to be contraband would be delivered by United States postal authorities to 71 Arnold Street on January 16th, 1970. Because of the singular circumstance of advance information in this matter, the police followed the constitutionally sanctioned better procedure of obtaining judicial sanction for their search, rather than entering the premises without a warrant, after delivery, in the hopes that the occupants of the house would be "knowingly" possessing the illegal contents of the package. To require that the search warrant be issued only after the package was delivered as arranged would be to place formalistic restrictions on police activity. In upholding the warrant in the instant case the New York courts applied the rule consistently stated by this Court, that searches under a warrant be accorded preference over warrantless searches, even in doubtful or marginal cases, as they are to be interpreted in a commonsense and realistic fashion rather than a hypertechnical manner (*United States v. Ventrusca*, 380 U. S. 102; *Aguilar v. State of Texas*, 378 U. S. 108; *Jones v. United States*, 362 U. S. 257; *Johnson v. United States*, 333 U. S. 10; *Chapman v. United States*, 365 U. S. 610). That determination should not now be overruled.

Conclusion

Review by this Court is not required in the instant case where the state courts have upheld a search conducted pursuant to a search warrant issued upon existing facts constituting probable cause to believe that known contraband would be delivered to specified premises at an arranged future time. The decision of the state courts is in full accord with constitutional principles and the interpretation of those principles by this Court.

The writ of certiorari applied for should be denied.

Respectfully submitted,

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JUDITH BLAKE MANZELLA,
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Of Counsel.

Dated: June 22nd, 1972.